CHOP ENG LAM

v.

THARA SINGH SIDHU

HIGH COURT MALAYA, MALACCA
BTH LEE J
[CIVIL APPEAL NO. 13 OF 1980]
27 OCTOBER 1981

LAND LAW: *Recovery of possession of rent controlled premises - Whether tenant in occupation of premises - Owner reasonably requiring premises for self-occupation - Court order for vacant possession when reasonable - Availability of suitable alternative accommodation for tenant - Section 16(1)(f), (i), (m) Control of Rent Act 1966.*

CIVIL PROCEDURE: *Fresh evidence - When admissible; findings of lower court - When such finding can be disturbed.*

The appeal was by the tenants/appellants against the decision of the Magistrate, Jasin, Malacca giving possession of the premises known as No. 23, Jalan Chan Koon Cheng, Malacca to the landlord/respondent in the action within three months from the date of decision on 19 September 1980.

On 25 September 1979, the respondent had become owner of the said premises which were rent controlled. The appellants were in occupation of the said premises from the previous landowner, continued to occupy the premises and tendered the monthly rent at RM31 to the respondent. The respondent served notice to quit on the appellants on 2 December 1979, expiring on 31 January 1980. The respondent sought possession of the premises for his law practice in Malacca which he had commenced since April 1979. He however stays in Tampin.

Before serving the notice the respondent had offered the appellants RM10,000 in order to obtain vacant possession.

In his statement of claim, the respondent averred that the appellants were not in occupation of the premises and did not require them and that in all the circumstances an order could be made under s. 16(1)(m) of the Control of Rent Act 1966, for vacant possession. The respondent claimed that he was an advocate and solicitor practicing at a temporary address and required the premises for the purpose of his law practice.

In their statement of defence, the appellants contended that the notice to quit was bad in law, that they had always been and were still in occupation of the premises.

Evidence had been given by two witnesses for the respondent, PW2, a process server, and PW3, a clerk attached to a housing agent firm, that on the occasion they had visited the premises they had found it unoccupied. The respondent did not claim personal knowledge that the premises were unoccupied.

The appellants' contentions were that the premises were occupied by their children during school days. The premises also served its purpose for their business dealings in Malacca, and was used by the members of the firm who lived in Jasin as a resting place when they conducted their business there. This evidence was given by DW1.

The Magistrate had accepted the evidence of PW2 and PW3 and rejected that of DW1. In her grounds of decision, she stated that she found it difficult to believe that the appellants used the house for their business and gave her opinion as how business is usually conducted. The Magistrate gave judgment on 27 August 1980, to the respondent.

An application supported by affidavit was made by the appellants on 8 October 1980, for a stay of execution in respect of the judgment obtained on 27 August 1980. The respondent by affidavit dated 19 September 1980 introduced fresh evidence as a result of which the Court ordered the appellants to deliver vacant possession of the premises within three months from 19 October 1980. *King v. Taylor* [1954] 3 AER 373, in which it was held that change of circumstances between hearing and appeal; can be taken into account, was cited.

The appellants appealed. The memorandum of appeal set out four grounds of appeal:

(i) That the Magistrate erred in fact in finding that no one was occupying the said premises or any part thereof.

(ii) That the Magistrate erred in law in holding that the Court need not concern itself with the question of the availability of suitable alternative accommodation.

(iii) That the Magistrate erred in law in applying the provisions of s. 16(1)(i) of the Control of Rent Act 1966.

(iv) That the Magistrate erred in law in holding that the provisions of s. 16(1)(f) of the Act did not apply in the case.

The learned Judge, B.T.H. Lee, held that substantial miscarriage had occurred as a result of the misdirection of the Magistrate.

Held:

[1] The Magistrate had erred in her approach to the evidence and thereby misdirected herself when she arrived at a finding of fact that no one was occupying the said premises.

(a) Different business people conduct their business in different ways. It was purely speculation on the part of the Magistrate when she held that business men would not conduct their business in the manner appellants claimed to have conducted theirs.

(b) DW1 should have been cross-examined regarding the use of the premises by the appellants' children and been given an opportunity to explain how the children spent their time after school and why the house was locked when the respondent's witnesses had visited it. Therefore it was purely conjectural on the part of the Magistrate to hold that the children might have been engaged in extra-mural activities in their respective schools after school hours.

It is right and proper that the witness should be challenged in the witness box or, at any rate, that it should be made plain, while the witness is in the box, that his evidence is not accepted (*Walter Berkley Hart* 23 Cr App R. 202). If the opponent declines to avail himself of the opportunity to put his essential and material case in cross-examination, then he must be taken to accept the plaintiff's account in its entirety. Such failure leads to miscarriage of justice (*A.E.G. Carapiet v. A.Y. Derderian* [1961] AIR 48 Calcutta 359).

(c) Even if the evidence of PW2 and PW3 was accepted in its entirety in that when they visited the house there was nobody in the premises, it did not necessarily follow at all that the appellants or their children attending schools in Malacca were not in occupation or had given up occupation of the premises. A tenant does not necessarily cease to be

in occupation if he absents himself from the demised premises, intending to return. The question of temporary absence is one of fact and degree. (*Brown v. Brash* [1948] 1 All ER 922). An appellate Court should be slow in disturbing findings of fact arrived at by the lower Court which had the advantage of seeing and hearing the witnesses, unless the lower Court had erred in its assessment of the evidence, or had misdirected itself or that for some good reasons the conclusion reached by it should be upset. (*M.K. Ramasamy Pillai v. O. RM. M: SP. SU. Meyappa Chettiar & Anor*. [1955] MLJ 105, 107, *Beck v. Scholz* [1953] 1 All ER 814 and *Haskins v. Lewis* [1931] 2 KB 1 were distinguished on the facts).

[2] The claim by the respondent should have failed because the respondent had not complied with s. 16(1) (f) (ii) of the Control of Rent Act, which section requires one year's notice to determine a tenancy where the controlled premises are reasonably required by the owner for occupation by himself. The respondent had served notice to quit on 2 December 1979, expiring on 31 January 1980.

[3] The Magistrate erred in law and fact in holding that "there is no one in need of suitable alternative accommodation in which event the Court need not concern itself with the question of suitable alternative accommodation" in applying both s. 16(1) (i) and s. 16(1) (m) of the Act. Section 16(1) (i) provides that order for possession may be given where neither the tenant nor any member of his family is personally in occupation of the controlled premises, while s. 16(1) (m) states that an order for possession may be made where the Court considers it reasonable that such an order be made and is satisfied that suitable alternative accommodation is available for the tenant. The respondent had proceeded under s. 16(1) (m) which provides another case where a landlord may recover possession in addition to and independent of the other thirteen circumstances provided by the section (*Yeong Peng Wah v. Bahal Singh* [1961] MLJ 316; *Ponnudurai v. Jayatileka* [1965] 1 MLJ 131). But the question of reasonableness is dependant upon that of suitable accommodation (*Malayan Theatres Ltd. v. Hardial Singh & 3 Ors.* [1951] 17 MLJ 212).

First the Court must consider it reasonable to make the order asked for. Secondly, the Court must be satisfied (a) that there is alternative accommodation; (b) that it is suitable (*Rhodes v. Cornford* [1947] 2 Al1 ER 601).

The onus of proving that other accommodation is available for the tenant is upon the landlord (*Nevile v. Hardy* [1921] 1 Ch 404) whereas to succeed the appellants must show that the Magistrate misdirected herself on a question of law or that she based her judgment on the finding of fact of which there was no evidence (*Smith v. Penny* [1947] 1 KB 230).

[5] That the proceedings in the lower Court regarding the application on 8 October 1980 for a stay of execution were vitiated by the admission of inadmissible evidence. Fresh evidence would not be allowed in connection with the appeal. It was an essential condition that the fresh evidence which is being sought to be introduced was not available at the trial and that reasonable diligence would not have made it available (*Kesarmal & Anor. v. Valliappa Chettiar* [1954] 20 MLJ 119).

(The learned Judge observed that O. 55 r. 14(7) of the Rules of the High Court, 1980, to which reference had been made by the respondent had been deleted by Practice Direction No. 2/81 with effect from 1 April 1981, whereas the appeal was heard on 22 June 1981.)

[The appeal was allowed with costs in the High Court and below.]

Cases referred to:
King v. Taylor [1954] 3 All ER 373
Walter Berkley Hart 23 Cr App R. 202
A.E.G. Carapiet v. A.Y. Derderian [1961] AIR 48 Calcutta 359
Brown v. Brash [1948] 1 All ER 922
M.K. Ramasamy Pillai v. O. RM. M: SP. SU. Meyappa Chettiar & Anor. [1955] MLJ 105, 107,
Beck v. Scholz [1953] 1 All ER 814
Haskins v. Lewis [1931] 2 KB 1
Yeong Peng Wah v. Bahal Singh [1961] MLJ 316
Ponnudurai v. Jayatileka [1965] 1 MLJ 131
Malayan Theatres Ltd. v. Hardial Singh & 3 Ors. [1951] 17 MLJ 212
Rhodes v. Cornford [1947] 2 All ER 601
Nevile v. Hardy [1921] 1 Ch 404
Smith v. Penny [1947] 1 KB 230
Kesarmal & Anor. v. Valliappa Chettiar [1954] 20 MLJ 119

Legislation referred to:
Control of Rent Act 1966, 16(1)(m), (i), (f)
Rules of the High Court 1980, O. 55 r. 14(7)

For the appellants-Yeu Jiok Hua
For the respondent-Thara Singh Sidhu

(Digest Form Only)

Also found at [1982] CLJ 35